APPEAL NO. 022714
FILED DECEMBER 11, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 24, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable repetitive trauma injury with a date of injury of _____; that the appellant (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; and that because the carrier waived the right to contest compensability, the carrier is not relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001. The carrier appeals, arguing that the determination that it waived its right to contest compensability and that the claimant sustained an injury in the course and scope of her employment are not supported by credible evidence. The carrier additionally argues that the hearing officer erred in making a finding of fact on disability when the issue was not before her and was not raised at the CCH. The appeal file does not contain a response from the claimant.

DECISION

Affirmed as reformed.

Section 409.021(a) provides that the insurance carrier is to begin the payment of benefits or notify the Texas Workers' Compensation Commission (Commission) and the claimant of its refusal to pay benefits within seven days after receiving written notice of the injury (the "pay or dispute" provision). On August 30, 2002, the Texas Supreme Court denied a carrier's motion for rehearing in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), and as such, the Downs decision, along with the requirement to strictly adhere to the seven-day "pay or dispute" provision is final. The carrier offered a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) into evidence that stated that it received written notice of the claim on August 8, 2001. The TWCC-21s contained in the record do not show that the carrier contested the claim on a date earlier than October 5, 2001, and carrier did not contend that there was a TWCC-21 filed on an earlier date. October 5, 2001, is more than seven days after August 8, 2001. The carrier therefore did not comply with the requirements of Section 409.021(a) by either initiating benefits or filing a dispute. The carrier thus lost its right to contest the compensability of the repetitive trauma injury. *See* Texas Workers' Compensation Commission Appeal No. 022027-s decided September 30, 2002. Both at the CCH and on appeal, the carrier argues that it "did timely file a dispute on newly discovered evidence." Section 409.021(d) provides that a carrier may reopen the issue of the compensability of an injury if it learns of evidence that could not reasonably have been discovered earlier. Whether evidence could have been reasonably discovered earlier was a matter within the sound discretion of the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92038,

decided March 20, 1992. In view of the evidence presented, we cannot conclude that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant had the burden to prove that she sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cain, *supra*. Accordingly, no sound basis exists for us to disturb that determination on appeal.

The carrier contends that, since disability was not an issue at the CCH, the hearing officer erred in making Finding of Fact No. 7 (the second No. 7 listed in the decision and order) that, "[d]ue to the work injury, claimant was unable to obtain and retain employment at her preinjury wages from September 7, 2001, through December 1, 2001." According to the benefit review conference (BRC) report, disability was not an issue at the BRC, and there was no issue of disability at the CCH. Thus, under Section 410.151(b) we agree with the carrier's contention concerning the second Finding of Fact No. 7 and we hereby reform the hearing officer's decision by striking the second Finding of Fact No. 7. However, this reformation to the hearing officer's decision does not mean that claimant did not have disability or that the carrier is not liable for temporary income benefits. It simply reflects our agreement with the carrier's contention that disability was not an issue at the CCH.

We affirm the decision and order of the hearing officer as reformed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge